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No. 95-1741

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MOODY H. DAVIS, PATRICIA DAVIS, and
THE BURK B. ROBERTS TRUST,
Petitioners,

v.

STUART D. SHANOR, TRUSTEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

R. STEVEN JONES
(Counsel of Record)
TED S. BYERS
HESSE & JONES
A Professional Corporation
4950 Westgrove
Suite 100
Dallas, Texas 75248
(214) 733-3117
Counsel for Petitioners

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PETITIONERS' REPLY BRIEF

As Respondent's Supplemental Statement has delved into a detailed summary of the prior interplay between Petitioners and Respondent in the Bellamah Bankruptcy case, Petitioners believe several other facts should be considered by this Court for completeness.

Following Respondent's seeking and obtaining authorization to operate the debtor's business pursuant to the provisions of 11 U.S.C. § 721, Respondent sought approval from the bankruptcy court to enter into various contracts for sales of portions of the Lakepointe Property. The aggregate value of the "subordinate Mortgages or Deed of Trust" granted by Bellamah against the Lakepointe Property exceeded $100 million dollars. Nonethe-

less, Respondent sought approval of sales of the Lakepointe Property knowing that no funds resulting from such proposed sales would be available for unsecured creditors. However, the initial contracts for which Respondent sought approval from the bankruptcy court provided for the payment of a commission to the Trustee as well as the payment or assumption of the delinquent ad valorem property taxes which had accrued against the Lakepointe Property.

Finally, Petitioners concur that the bringing of this Petition by a secured creditor rather than a taxing authority is noteworthy. Far too often, secured creditors have been reticent to pursue such matters allowing fee motivated trustees to: (1) allow ad valorem taxes to accrue on property then conveniently absolve all responsibility for such dereliction by means of abandonment or (2) retain overly encumbered property in the bankruptcy estate for years under the guise that if sold, the accruing ad valorem taxes would be paid or assumed by the purchaser. Accordingly, in light of the fact that Petitioners were sued in Texas state court for nearly Two Million Dollars ($2,000,000.00) in ad valorem property taxes, penalties and interest that accrued as a result of the Respondent's conscious refusal to pay such liabilities, this case is, indeed, a "noteworthy" one.[1]

I. RESPONDENT'S BRIEF MISSTATES TEXAS LAW.

The Respondent states that "he 'disposed' of the [Lakepointe] property by abandonment 'subject to' the state taxing authorities' liens on the [Lakepointe] property for accrued tax liability." Respondent's Brief at 12. The Respondent asserts this was in conformance with "Texas

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[1] In all, Petitioners paid in excess of Two Million Dollars ($2,000,000.00) to fully satisfy such delinquent ad valorem taxes, penalties and interest. Of this amount, in excess of One Million Dollars ($1,000,000.00) had accrued prior to Respondent's abandonments of the Lakepointe Property.

ad valorem tax laws on real property." *Id.* at n. 5.[2] The Respondent fails, however, to inform this Court that Texas property tax laws also provide for personal liability for ad valorem taxes and that such personal liability is not relieved by disposition of the property. Tex. Tax Code Ann. § 32.07 (Vernon 1992). Consequently, while the Respondent may believe that the abandonment of the Lakepointe Property was "subject to" the state taxing authorities' liens, Texas law provides that abandonment did not relieve the Respondent of personal liability for the post-petition ad valorem taxes that attached prior to abandonment.

II. RESPONDENT'S BRIEF CONTAINS NUMEROUS MISSTATEMENTS OF FACT.

A. Petitioners' Action Did Not Challenge the Respondent's Authority to Abandon the Lakepointe Property.

The Respondent asserts that "[i]n the courts below . . . Petitioners were urging that Section 959(b) placed limits on the bankruptcy trustee's authority to abandon property which he operated". Respondent's Brief at 23.

This declaration contains a significant misstatement of fact. Petitioners, by the instant case, have not challenged the authority of the Respondent to abandon the Lakepointe Property. The Respondent is apparently confused between this proceeding and a prior proceeding not encompassed within this Petition.[3]

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[2] The Trustee cites to Section 32.01(a) of the Texas Property Code in support of this assertion. There is no Section 32.01(a) to the Texas Property Code.

[3] Petitioners lodged a challenge to the abandonments on a variety of theories including procedural due process grounds in *Davis et al v. Shanor*, Cause No. 92-453 JP/WWD, In the United States District Court for the District of New Mexico. This case was dismissed by the Appellants on August 31, 1993, while on appeal to the United States Court of Appeals for the Tenth Circuit.

B. Respondent Misstates the Issue Regarding Requests for Payment of Taxes.

In his brief, Respondent states that "[t]he Tenth Circuit ruled that there was no authority to pay *ad valorem* taxes as there had been 'no request for payment by the taxing authorities' under 11 U.S.C. 503(a)". Respondent's Brief at 27 *quoting* App. A at 7a. Petitioners believe this statement fails, on several levels, to accurately characterize the issue regarding prior requests for payment of taxes.

First, Respondent has quoted *dicta* from the Tenth Circuit. As such, and by the Tenth Circuit's own directive, this statement was not a factor in the Tenth Circuit's ruling and thus did not constitute an "independent ground" of affirmance. *See* App. A at 7a.

Second, Respondent is aware that advancing this assertion, absent consideration of the proper context, misleads this Court. In fact, as early as 1990, one of the taxing authorities involved in this case [4] filed a proof of claim in the bankruptcy court asserting entitlement to administrative expense treatment for post-petition ad valorem taxes.[5]

Finally, when it became apparent that the Tenth Circuit might have considered this false trail created by Respondent, Petitioners promptly filed a Motion for Leave to Supplement the Record on Appeal to advise the Tenth Circuit that the taxing authorities, in fact, had sought proof of claim relief for collection of post-petition ad

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[4] The taxing authorities involved in this matter were the County of Denton, the City of Lewisville, the Lewisville Independent School District and the Denton County Education District.

[5] Additionally, the Respondent's argument that the failure of Petitioners to comply with the procedural prerequisites of 11 U.S.C. § 503 precludes payment of taxes mandated by Section 960 ignores the directives articulated by this Court in *Boteler v. Ingels*, 308 U.S. 57 (1939) and *Swarts v. Hammer*, 194 U.S. 441 (1904). In those cases, this Court held that a trustee has a duty to pay the taxes that accrue against estate property during the administration of the estate.

valorem taxes. Although the Tenth Circuit denied the Motion, it acknowledged that "the supplement pertains only to a collateral issued discussed by the court in its disposition and would not effect any change in the results of the case."

III. THE APPLICATION OF SECTION 503 DOES NOT PRECLUDE THIS COURT FROM DECIDING THE ISSUES PRESENTED.

In his brief, Respondent stated that the Tenth Circuit held "that the procedural requirements necessary to authorize the Trustee to pay taxes were not fulfilled." Respondent's Brief at 29. This statement is contrary to the plain language of the prior orders of the Tenth Circuit. In denying Petitioners' Motion to Supplement the Record on Appeal, the Tenth Circuit characterized the issue of whether the taxing authorities had previously made claims for post-petition ad valorem taxes as a "collateral issue". Further, as set forth *supra*, the discussion by the Tenth Circuit of the requirements of Section 503 is *dicta* and did not form a basis for its decision below.[6]

Finally, Respondent, as would be expected, argues the "extremely uncompelling" nature of this case for review and the inconsequential effect of a pronouncement by this Court that would vacate the rulings below. However, this case does present issues of pervasive scope and impact as review by this court will address the statutory duties and fiduciary obligations imposed on all trustees in bankruptcy, not just the failures by Respondent in the instance case.[7]

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[6] The Table of Authorities in Respondent's Brief cites 11 U.S.C. § 503 (1993). Respondent's Brief at iii. The portion of Section 503 set forth at length in Respondent's Brief, however, reflects the changes legislated by the Bankruptcy Reform Act of 1994. *See* Respondent's Brief at 2.

[7] Not insignificant is Respondent's *unstated* reasons for the denial of this Petition. Respondent is keenly aware of the magnitude of the consequences of such a ruling. For example, the

CONCLUSION

For the reasons set forth in the Petition and this Reply, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

R. STEVEN JONES
(Counsel of Record)
TED S. BYERS
HESSE & JONES
A Professional Corporation
4950 Westgrove
Suite 100
Dallas, Texas 75248
(214) 733-3117
Counsel for Petitioners

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issues raised in the Petition directly impact a pending case styled *Chameleon Holdings Company v. Shanor,* Cause No. 95-960; In the United States District Court for the District of New Mexico (a case where Petitioners' successors-in-interest have made a request for payment of post-petition ad valorem taxes as an administrative expense under Section 503). Respondent is the Appellee in that case and has pled "law of the case" from the Tenth Circuit's decision in the case before this Court as a bar to any liability for the payment of such ad valorem taxes.